No. 15,873

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE and HARLAN L. McFARLAND,
Appellees.

On Appeal from the United States District Court for the Southern District of California, Northern Division.

REPLY BRIEF OF APPELLEES E. B. HOUGHAM, OWEN DAILEY, WILLIAM E. SCHWARTZE AND HARLAN L. McFARLAND.

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In a separate appeal the Defendants E. B. Hougham, Owen Dailey, William E. Schwartze and Harlan L. McFarland have urged this Court to reverse the judgment of the District Court on the ground that the action is barred by the Statute of Limitations, that the Findings of Fact and Conclusions of Law are defective, and upon the ground that the evidence is insuffi-

cient to support a finding of any trick, scheme or device.

The Government has appealed claiming that the District Court erred in denying it the right to change the form of relief requested from $2,000.00 per act to twice the consideration paid.

It attempts to raise the question of when and how it must choose the alternative relief afforded it as a civil penalty under the provisions of the War Surplus Act of 1944.

REPLY TO GOVERNMENT'S POSITION.

It is submitted that the Government should be denied the right to change the form of relief requested, for the following reasons:

1 The Government failed to raise the points urged in its specification of errors in the Trial Court and cannot be allowed to raise them for the first time on appeal.

2. It elected its form of remedy by filing the action and asking for the sum of $2,000.00 as a civil penalty for each act.

3. Assuming, but not conceding, that the election was not complete at the time of the filing of the action, it waived its right to elect twice the consideration agreed to be given by:

(a) Withdrawing the First Amended Complaint;

(b) Offering the Second Amended Complaint;

(c) Proceeding to Judgment on the Second Amended Complaint.

4. The Government is estopped to change its position because defendants will suffer prejudice if it is allowed to do so.

5. The cause of action set forth in the First Amended Complaint is barred by the Statute of Limitations.

6. It would be entitled to no relief under the prayer of the First Amended Complaint upon the facts pleaded because no monies were alleged to have been "agreed to be given".

7. The Trial Court has found upon the evidence that the trick or device here involved did not embrace "monies agreed to be given".

POINT 1.

THE GOVERNMENT FAILED TO RAISE THE POINTS URGED IN ITS SPECIFICATION OF ERRORS IN THE TRIAL COURT AND CANNOT BE ALLOWED TO RAISE THEM FOR THE FIRST TIME ON APPEAL.

Although the Government's pre-trial assertions of issues to be litigated upon the trial include the contention of the plaintiff that it is entitled to double the sale price of the vehicles (101), it failed to present the point to the Court below. The Second Amended Complaint, upon which plaintiff went to trial, contained no such prayer. On the contrary, it prayed for $2,000.00 damages per act (55, 72-73).

The only place in which the contention is made is in the First Amended Complaint (25, 42-43).

Although a motion was made to file the First Amended Complaint in lieu of the original Complaint (23), this motion was never pressed, but, on the contrary, was voluntarily withdrawn by the Government. In the Memorandum Opinion of Judge Jertberg (43-52), the pertinent portion reads:

> "Prior to ruling on these motions (defendants' Motion to Dismiss and plaintiff's Motion to File First Amended Complaint) and on December 21, 1956, pursuant to Rule 15 (a) of Federal Rules of Civil Procedure, plaintiff moved for an order permitting the filing of a Second Amended Complaint, on the ground that the Second Amended Complaint was made to conform to the proof that that the plaintiff intends to submit at the trial in support of its claim for relief, *and in that motion plaintiff withdrew the proposed First Amended Complaint.*"

and on page 49:

> "The remaining motion to be considered is the motion of plaintiff for an order permitting the filing of a Second Amended Complaint."

and on page 54:

> "The motion of plaintiff to file the Second Amended Complaint and to withdraw the proposed First Amended Complaint is granted."

It will thus be seen that the point never was presented to the Court below, and the Court below did not err "in holding that the United States irrevocably elected its choice of statutory remedies for fraud by filing its original Complaint (Specification of

Error No. 1, Appellee's Brief, page 9)", and did not err "in refusing to allow the Government to amend its initial Complaint with respect to damages". (Specification of Error No. 2, page 9.) Although a motion was made to file the First Amended Complaint, the Government for reasons of its own voluntarily abandoned this position on December 21, 1956, prior to the ruling on the motion to file the First Amended Complaint, by filing the motion to file the Second Amended Complaint (48). It argued and submitted its second motion to the Court on January 14, 1957. The motion was granted January 18, 1957 (55).

The Pre-Trial Conference Order was not prepared until August 31, 1957 (104), long after the Government had waived the right to further urge the point. The rule is well settled that a litigant may not for the first time on appeal raise a question not first submitted to the Trial Court and ruled upon at that level.

Hecht v. Alfaro, 10 Fed. 2d 464;
Union Wire Rope Corp. v. A. T. & S. F. Rwy., 66 Fed. 2d 905;
N. Y. & T. Land Co. v. Gulf W. T. & P. R. Co., 100 Fed. 830, 41 C.C.A. 87.

The fact that the matter was injected into the Findings and Conclusions of Law in Conclusion No. 3 (115-117) cannot aid the Government, for Findings and Judgments must have a basis in the pleadings and in the evidence. A Judgment on a matter outside of the issues raised by the pleadings must of necessity be altogether arbitrary and unjust as it

attempts to conclude a point on which the parties have not been heard. A material variance arises where a party pleads one cause of action and attempts to prove another and different one. It follows that a party must recover, if at all, upon the case made by his pleadings. 41 *Am. Jur.* 555, 556.

POINT 2.

THE GOVERNMENT ELECTED ITS FORM OF REMEDY OR RIGHT BY FILING THE ACTION AND ASKING FOR $2000.00 AS A CIVIL PENALTY FOR EACH ACT.

The Government elected by filing the original Complaint. The prayer of the original Complaint is for $2,000.00 per act (Paragraph VIII, page 9, and prayer, page 22).

Section 26 of the War Surplus Act of 1944, 50 U.S.C.A. 1635(b) provides in part:

> "Every person . . . who enters into an agreement, combination or conspiracy to do any of the foregoing (1) shall pay to the United States the sum of $2000.00 for each such act . . . or (2) shall, *if the United States shall so elect,* pay to the United States as liquidated damages a sum equal to twice the consideration agreed to be given by such person to the United States or any government agency, or (3) *if the United States shall so elect* restore to the United States the property . . ."

By the very terms of the Act itself only one remedy may be chosen, and the choice of one necessarily excludes the remainder. The Government made

this choice at the time of filing the original Complaint.

28 C.J.S. 1057 provides:

> "an election of remedies is the adoption of one of two or more co-existing remedies, with the effect of precluding a resort to the others."

And at page 1088:

> "The commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such proceeding, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights . . ."
>
> *U. S. v. Oregon Lumber Co.,* 260 U.S. 290, 67 L.Ed. 261, 43 S.Ct. 100;
>
> *Minneapolis Nat. Bank of Minneapolis, Kan. v. Liberty Nat. Bank of Kansas City,* C.C.A. Kan., 72 F. 2d 434.

United States v. Oregon Lumber Company, supra, on page 295 states:

> "Any decisive action by a party with knowledge of his rights, and of the facts, determines his election in the case of inconsistent remedies, and one of the most unequivocal of such determinative acts is the bringing of a suit based on one or the other of these inconsistent conclusions."

Since the remedies provided in the War Surplus Act are co-existent the choice of one made at the time of the filing of the complaint excludes the oth-

ers, and plaintiff should not be allowed at a later date to change its theory and form of action. The Act, in effect, says: "Here are three apples. Choose one." or "Take this one, unless you elect one of the other two."

The Government argues that the congressional intent was to provide for "the honest administration of the Act". We have no dispute with this assertion. The Act amply so provides, without distorting its language.

We dispute, however, its contention that in order to provide for the honest administration of the Act, in addition to criminal sanctions the Government is given three civil remedies against those who defraud. By the language of the Act itself it is not given three remedies. It is given one statutory remedy, and it is told in explicit language to elect one remedy from a choice of three alternatives:

1. $2000.00 per act;
2. Twice the consideration "agreed to be paid" (if any); and
3. Return of the property.

The purpose of the Act is to promote the honest administration of justice by providing remedies in different forms to meet different situations. Yet the Government seeks to place an interpretation upon the Act liberally construing it in its own favor, above and beyond the reasonable and clear language thereof, with the obvious end in view of transforming it into a dollar-making machine regardless of

the equities involved. Such a position is not justice; it is persecution.

The Act, being penal in nature, should be strictly construed against, and not in favor of, the Government. *Rainwater v. United States,* 78 Sup. Ct. Rep. 946.

50 *Am. Jur.* at page 432 states:

> "The ordinary application of the rule of strict construction of penal statutes is to statutes that impose punishment for the commission of a crime. However, the rule as to strict construction of penal law is also applied to statutes not strictly criminal but of that nature. It prevails as to retaliatory statutes and statutes which impose penalties or forfeitures which provide for a recovery of damages beyond just compensation to the party injured."

This is clearly such a statute. It says the Government shall select one of three alternative remedies. This necessarily means that the selection of one is an abandonment of the other two. This the Government did at the time of the filing of the original complaint. It did so with full knowledge of all of the pertinent facts, as will be noted by comparison of the items involved in the original and the First Amended Complaint. They are identical, with one minor exception, a truck. (50)

The Government argues that the holding of the Court below "closed the door on the other remedies which the statute provides". This argument is fallacious. The provisions of the Act itself close the

door on the other remedies after the selection is made by the Government. Should Congress decide that a different method of "closing the door" is appropriate it could amend the Act; it is not for the Courts, by judicial construction, to evade the Act.

The Government suggests that the ruling of the Court allows these defendants to escape "the full measure of damages stipulated by the Act". Such a suggestion is grim humor, to say the least. By the judgment of the Court these defendants have been assessed the full measure of damages provided by the Act for the alleged wrongs which were established by the evidence.

The case of *Bernstein v. U. S.* is relied upon. That decision is not yet final and is distinguishable from the case at bar in many respects, which will be hereafter noted.

The first feature distinguishing the two cases, as has been noted in Point 1, is the manner in which the question involved was presented in the Court below. In the *Bernstein* case a record was made in the Court below from which the point there involved could be successfully presented to the Circuit Court. There is a deficiency in this record in that respect.

The second distinction appears in the type of relief sought in the two cases, which brings into play entirely different lines of reasoning. In the *Bernstein* case it was noted that the War Surplus Act provides one of three alternative remedies specfied in the Act, *and, in addition, common law remedies when applicable.*

In the original Complaint in the *Bernstein* case the "double the monies agreed to be paid" phase of the War Surplus Act was relied upon, and a specific and definite statement of this election of one of the three alternative statutory remedies was made in the Complaint. At a much later date a common law remedy, to-wit, rescission, plus resulting trust theory, was injected into the case by an amended pleading, which was allowed in the Trial Court. The Government never attempted to select a second statutory remedy.

To this so-called common law theory, the defense of election of remedies was raised by Answer, and a finding favorable to the election was made by the Trial Court after taking full evidence upon the subject. The Opinion of the Circuit Court in that appeal is directed not to the question of alternative remedies specified by the War Surplus statute but to the question of whether or not the common law doctrine of election of remedies should be applied at the time of filing the original action or at a later date, or at all. There is no such question before this Court in this appeal. Here the question involves not the common law application of the doctrine of election of remedies but it involves the mandatory requirement of the election of one of three remedies, contained in the specific language of the War Surplus Act itself.

In the instant case the specific question is when, under the War Surplus Act, must the Government elect the alternative civil remedy? At the time of

filing the action? At a later date, before trial? Or may it harass a litigant through a trial and exercise its judgment of hindsight and select an alternative that it thinks might be more excruciating? The *Bernstein* opinion has no bearing upon this problem and its decision is of no assistance whatsoever to this Court.

The reasoning of the *Bernstein* case is faulty in that it relies upon Rule 8 (e) F.R.C.P. which states that a pleading is a simple concise statement of the operative facts upon which relief can be granted upon any ordinary sustainable legal theory regardless of consistency *where the prayer or demand for relief is no part of the claim and the dimensions of the lawsuit are measured by what is proven.* Here we do not have such a situation. On the contrary, we have a situation where the prayer is an essential element of the cause of action, since it necessarily formulates the alternative type of relief afforded by the War Surplus Act, which commands the election.

The opinion of Chief Justice Knous of the District Court in the *Bernstein* case, reported in 149 Fed. Supp. 568, is much more logical and better reasoned, and is adopted here in its entirety in refutation of the Opinion of the 10th Circuit. We are heartily in accord with his suggestion that *the Government should not be allowed to indulge in the practice of burning the candle at both ends.*

The Government suggests the concept that a complaint is simply general notice of the type of suit involved, which may be a proper concept of

pleadings generally. It has no bearing where an election of remedy is a necessary element of the type of relief claimed, and is made so by statute.

There is no merit to the suggestion that the requirement of selection of one of three alternative remedies, contained in the Surplus Property Act, might become a game of skill in which one misstep by counsel may be decisive. The Government had ten years to make up its mind. The case of *Hickman v. Taylor,* 329 U.S. 495, states:

> "The new rules, however, restrict pleadings to the task of general notice giving."

That task is not complete in a surplus property action until the type of remedy is selected.

Here we are not dealing with a general provision of substantive law but on the contrary with a statutory remedy. The remark of Judge Yankwich in *Ester v. Western Union,* 25 Fed. Supp. 578, would be appropriate in a substantive law case; however, the allegation of the type of damage sought is a necessary part of the statement of the cause of action itself in the instant case.

We have no quarrel with Rule 15, F.R.C.P. to the effect that liberal amendments shall be allowed when justice so requires. There has been an amendment allowed in this case in the interest of justice. The Government simply overlooks the fact that we are not dealing with the common law doctrine of election of remedies which may be exercised at varying times, dependent upon the circumstances;

we are, on the contrary, dealing with the statutory requirement of the Surplus Property Act of the selection of one remedy, and the abandonment of others. It would not be "justice" to allow the Government to procrastinate.

The final argument of the Government that we are not dealing with inconsistency of remedies is in a sense true. We are dealing with an Act which requires the selection of one remedy and the abandonment of others.

In a further sense, however, the argument is not sound for the remedies authorized by the Surplus Property Act are actually inconsistent. As pointed out in the *Bernstein* case, the overlying theory of recovery of the property (rescission and constructive trust) is inconsistent with the right to claim $2,000.00 per act, or double the "monies agreed to be given".

Similarly, there are inconsistencies in a demand of "$2,000.00 per act" and double the "monies agreed to be given", for in one the focus is upon the number of transactions, and in the other the focus is upon the monetary consideration "agreed to be given".

The type of trial preparation would differ radically, depending upon the nature of the demand. The number of transactions, not their monetary worth, becomes the focal point where the demand is $2,000.00 per transaction, and the penalty is fixed. If the demand were double the consideration

"agreed to be given" the monetary element would predominate and the importance of the number of the transactions would diminish. A complete audit would be necessary, and a minute analysis of records, accounts, etc., would be required in order to prepare for such a case. In the trial of this case the foundation was waived in respect to all of the so-called financial documents (126), which never would have been the case had the demand been in a different form.

Different evidence would be required to establish a case under these conflicting theories. Under the "agreed to be paid" theory the evidence must establish that the trick or device consisted of a misrepresentation in respect to monies "agreed to be paid". Under the $2,000.00 per "act" formula the trick or device need not be concerned with monies "agreed to be paid" for the penalty to be affixed. This point will be developed more fully later in this brief.

The defendants were further prejudiced with respect to trial procedure in facing the problem of selecting or waiving a jury. Considerations which would affect this decision would necessarily differ, dependent upon the remedy sought.

In the discussion thus far the problem has been considered strictly from the point of view of election of remedies. It is suggested, however, that a deeper and more restrictive doctrine is also involved in the provisions of the War Surplus Act, namely, the doctrine of election of *rights,* as distinguished from, or in addition to, *remedies.*

By the provisions of the War Surplus Act the Government is given the right to one of the following:

(a) $2,000.00 per act;

(b) double the consideration agreed to be given;

(c) the return of the property.

The cases which discuss the doctrine of election of rights hold unequivocally that the election of one right of necessity operates to forego the other alternatives.

In *Schenck v. State Line Tel. Co.,* 238 N.Y. 308, 144 N.E. 592, at 593 the Court states:

> "An election of remedies presupposes a right to elect (citing cases). It is 'simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone."
>
> * * * * *
>
> "Often what is spoken of in opinions as a choice between remedies is in reality a choice of 'an alternative substantive right.' "

The above case is the subject of an annotation appearing in 35 A.L.R. 1153, wherein it is stated, at page 1153:

> "The rule as to election of remedies is not one of substantive law, but it is merely of judicial administration; and it is often confused with the question of the election of substantive rights. There is a clear distinction between the two. The doctrine of election of remedies applies in

order to protect one from vexatious litigation; while the rule as to election of substantive rights has to do with the actual status of some property or contractual rights. That is to say, a person having the option definitely to fix a property or contractual right without reference to the consent or wishes of the other party to the transaction is bound by his exercise of the option. This may be illustrated by reference to the right of a defrauded party to ratify and validate the contract, or the election of a seller to treat the title of goods as passed to the buyer, notwithstanding the latter's failure to perform a condition precedent. In such cases, by the exercise of his election, the party has definitely established the status of the right; and where he has acted with full knowledge of the facts, his act is properly irrevocable."

In the opinion on *Fire Protection Co. v. Hawkeye Tire & Rubber Co.,* 8 F. 2d 810 (8th C.C.A., 1926) the Court at pages 812-813 states:

"By the contract of sale the protection company, upon default in the payment of the purchase price, had the right to exercise its option to retain title, store and remove the sprinkler system, or to renounce its claim of title and enforce the collection of the purchase price. It had no option or right to do both, and a renunciation of its claim of title and right of removal and its election to enforce collection of the purchase price by filing its claim for its mechanic's lien, by filing its counter-claim for the purchase price and its cross-petition for the enforcement of its mechanic's lien in the state

court, was an irrevocable exercise of its option. The choice it reserved was not a choice of inconsistent remedies merely; it was a choice of contrary rights, of the right to title and possession of the sprinkler system and the right to the purchase price of it, rights which could not exist and be enforced at the same time; . . . *Van Winkle v. Crowell,* 146 U. S. 42, 13 S. Ct. 18, 36 L. Ed. 880; *Robb v. Vos,* 155 U. S. 13, 40, 43, 15 S. Ct. 4, 39 L. Ed. 52; *United States v. Oregon Lumber Co.,* 260 U. S. 290, 295, 43 S. Ct. 100, 67 L. Ed. 261; *Richards v. Schreiber,* 98 Iowa 422, 67 N.W. 569; *Kearney Elevator Co. v. Union Pacific Ry. Co.,* 97 Iowa 719, 66 N.W. 1059, 59 Am. St. Rep. 424. . . ."

And in *Boeing Airplane Co. v. Aeronautical Industrial District, etc.,* 91 F.S. 596 (1950), affirmed 188 F. 2d 357, certiorari denied, 342 U.S. 821, 96 L. Ed. 621, at page 613 it was said:

"'Election is simply what the term imports — a choice shown by an overt act between two or more inconsistent rights, either of which may be asserted at the will of the chooser alone.' 18 Am. Jur. 129, Election of Remedies, § 3. 'Often what is spoken of in judicial opinions as a choice between remedies is in reality a choice of alternative substantive rights. The distinction is one not infrequently obscured, and yet it is important that it is heeded. . . . The doctrine of election of remedies applies in order to protect one from vexatious litigation, while *the rule as to the election of substantive rights has to do with the actual status of some property or contractual rights. That is to say, a*

person having the option to fix definitely a property or contractual right without reference to the consent or wishes of the other party to the transaction is bound by his exercise of the option. . . . ' (Emphasis added.)

* * * * *

"We hold that the letter of April 22, 1948, manifested the intention of the plaintiff to rescind and was the acceptance by it of the choice between contract and no contract, a choice between substantive right or no right. The letter therefore constituted a final election to rescind."

Once the Government selected its substantive right that selection in itself eliminated its right at a later date to assume a position inconsistent with its former selection.

POINT 3.

IF THE FILING OF THE ACTION DID NOT CONSTITUTE AN ELECTION THE PLAINTIFF WAIVED THE RIGHT TO CHANGE THE FORM OF ACTION.

A. By Filing the Second Amended Complaint.

If the filing of the action did not constitute an election the plaintiff waived the right to change the form of action by filing the Second Amended Complaint.

4 C.J.S. 622 states:

"The subsequent amendment of a pleading usually waives the right to appeal from a judgment or order sustaining a demurrer to a former pleading, or from a ruling on a motion to strike or make more specific . . ."

The record in this case shows that the plaintiff voluntarily proceeded to trial upon the Second Amended Complaint. It should not be allowed at this late date to gamble on the outcome of the proceeding and retract its position because it became disappointed over the outcome.

B. By Voluntarily Withdrawing the First Amended Complaint.

Not only did plaintiff voluntarily proceed to trial upon the Second Amended Complaint, it voluntarily withdrew the First Amended Complaint. The Memorandum Opinion of Judge Jertberg summarizes the record in this respect as follows:

> "The motion of the plaintiff to file the second amended complaint *and to withdraw the proposed first amended complaint is granted.*" (54)

C. By Proceeding to Judgment.

Plaintiff further waived the right to complain by proceeding to judgment.

4 C.J.S. 625 states:

> "The right to appeal or bring error from an interlocutory order or decree will be regarded as waived where the party having such right voluntarily proceeds with, or participates in, subsequent steps in the trial, if this is inconsistent with the appeal or proceeding in error."

Thus the right to appeal upon this point has been held waived by proceeding with the trial without first preserving it in the record.

POINT 4.

THE GOVERNMENT IS ESTOPPED BECAUSE DEFENDANTS HAVE SUFFERED PREJUDICE.

The Government is estopped.

31 C.J.S. 417 states:

> "The public, in the exercise of a proprietary, as distinguished from a governmental function, may be estopped by the acts or omissions of its officers acting within the scope of their lawful authority."

The United States is not ordinarily estopped by acts done *in pais,* by its officers or representatives, but, when once in court, may be estopped of record by its attorneys and officers therein representing it.

First Nat. Bank v. U.S., D.C., Mo., 2 F. Supp. 107.

These defendants proceeded to trial upon the theory that the penalty sought was $2,000.00 an item. No particular stress was laid upon the dollar amounts involved, because that feature of the case was not before the Court. For that reason the foundation was waived in respect to practically every voucher, and no audit of any kind was undertaken or requested, to verify the accuracy and number of the same. Had a different form of relief been prayed for, defendants would have been forced to try the case upon an entirely different approach. Also, previously mentioned, is the jury problem.

It is readily ascertainable, therefore, that defendants would suffer great prejudice if this record at this time were looked at from a point of view of as-

certaining a recovery upon the theory of double the consideration involved.

POINT 5.

THE CAUSE OF ACTION SET OUT IN THE FIRST AMENDED COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS —HENCE NO PREJUDICE.

It is to be noted that the First Amended Complaint seeks relief entirely different from and inconsistent with that sought in the original Complaint. Paragraph VIII of the original Complaint (9 and 10) pleaded $2,000.00 per act, only. The companion paragraph of the First Amended Complaint (32) requested a sum twice the consideration agreed to be given the United States. The prayer of the original Complaint was for the sum of $2,000.00 per act, a total of $336,000.00 damages (23). The prayer of the First Amended Complaint was for "a sum equal to twice the consideration agreed to be given to the United States" (42).

Not only was the theory of the First Amended Complaint different from the theory of the original Complaint, but the facts upon which the relief was sought differed, in that the original Complaint alleged a false statement to the effect that the property was purchased for personal use only, and the First Amended Complaint alleged a false statement that the veteran owned more than 50% of the capital invested in an enterprise, or was entitled to more than 50% of the profits emanating therefrom, and thus secured a permit to purchase for resale.

The original Complaint was filed December 31, 1954 (23). The proposed First Amended Complaint was first submitted by motion upon November 13, 1956, almost two years later. The Statute of Limitations barred the action December 31, 1954, under defendants' theory, and certainly by November 13, 1956, under any theory of computation of time.

The First Amended Complaint being inconsistent in theory and based upon a wholly different set of facts could not be so similar in nature as to date back in time to the filing of the original Complaint for the purpose of applying the Statute of Limitations under Federal Rules of Civil Procedure, Section 15(c). A complete argument upon this point is set forth in Appellant's Opening Brief in our own Appeal and will not be repeated here.

POINT 6.

PLAINTIFF COULD NOT RECOVER UNDER THE FACTS PLEADED AND PROVEN UPON THE PRAYER OF THE FIRST AMENDED COMPLAINT.

The Surplus Property Act reads:

> "shall, if the Government so elects, pay to the United States as liquidated damages a sum equal to twice the consideration *agreed to be given* by such person to the United States."

There never was any money "agreed to be given" alleged in the Complaint. The transactions alleged were not executory but without exception were cash sales upon the spot. At no time was there any agree-

ment to *give* any sum in existence, and by no stretch of the imagination was any sum "agreed to be given" alleged in the Complaint.

The monies involved in this case were cash payments in consideration for the transfer of title to surplus property. It is conceivable that this section might be applicable to a case where, for instance, a bribe was involved or an executory contract fraudulently altered, but by no stretch of the imagination could it apply to a transaction of this character where no trick or device involving monies "agreed to be given" is pleaded.

The statute is entitled to a fair and reasonable construction and a strict construction against the Government where penal sanctions, whether civil or criminal in character, are involved.

50 *Am. Jur.* 432;

Rainwater v. United States, 78 Sup. Ct. Rep. 946.

To hold that the Government should be entitled to invoke twice the consideration agreed to be paid fails to give effect to the plain language of the Act. The Government is contending that the Act reads "to recover twice the monies *paid*", not "agreed to be given". This language does not appear in the Act. The consequences of such a construction are that monetary awards in favor of the Government are the sole objective of the Act, and not the honest administration of the disposition of surplus property. A violation of a minor regulation or of questionable character, or of a very slight nature, in a transaction

involving a large amount of money honestly and fairly paid and resulting in no monetary damage to the Government of any kind or character, could thus be catapulted into a triple recovery by the Government.

Furthermore, the Act as written, if so construed, is so ambiguous that it cannot be ascertained whether or not the Government in claiming double the amount agreed to be paid should not be required to allow the monies received as a credit.

50 *Am. Jur.* at page 383 states:

> "It is to be presumed that the legislature did not intend a law to work a hardship or an oppressive result, and it is a general rule that where a statute is ambiguous in terms and fairly susceptible of two constructions, the hardship which may follow one construction or the other may properly be considered."

And, further:

> "A construction should be avoided which would render the statute productive of unnecessary hardship, harsh or harmful consequences, or oppression, or arm one person with a weapon to impose hardships on another."

The Government may not argue that a strict construction imposes a hardship upon it. A literal construction of the language of the statute is all that defendants urge.

50 *Am. Jur.* 385 states:

> "A court may not extend a statute, or construe it otherwise than as written, to avoid a hardship. If the law as written works a hardship in a spe-

> cial class of cases, the remedy is to be effected by the legislature, and not by judicial action in the guise of interpretation. Hence, where the language of a statute is clear and unambiguous and the intention plain, it is the duty of the court to expound the statute as it stands."

Here the language of the statute is plain. It does not cover transactions that are *not* executory and do not involve monies that are not "agreed to be given".

In *U. S. v. Katz,* 90 Law. Ed. 988 (1925), Justice Stone states:

> "All laws are to be given a sensible construction, and a literal application of a statute which would lead to absurd consequences should be avoided whenever a reasonable application can be given it consistent with the legislative purpose."

POINT 7.

THE TRIAL COURT HAS FOUND UPON THE EVIDENCE THAT THE TRICK OR DEVICE HERE INVOLVED DID NOT EMBRACE "MONIES AGREED TO BE GIVEN".

The trial court specifically found that the transactions of all defendants did not involve a trick or device in which monies were "agreed to be given" (Finding IV, 108). In reference to Hougham and Dailey the Court found the act to be the presentation to the War Assets Administration of a Veteran's Application for Surplus Property in the name of Owen Dailey, Case No. V10A 55767, dated June 29, 1946, and the act of Hougham and Schwartze to be the presentation to the War Assets Administration of

his Application (Finding VIII, 111), and the act in respect to Hougham and McFarland to be the presentation of two Applications to the War Assets Administration (Finding XII, 114). It found that the *trick* did not involve monies "agreed to be given".

In other words, the Court specifically found that the trick or device embraced the acquisition, and not the use, of the applications, in each instance. This is tantamount to a direct finding against a trick or device involving monies. The Government received full payment for the merchandise it sold, and it follows that there was no fraudulent trick or device involving monies. The authorities are clear that where the trick or device used does not involve a monetary fraud the mere fact that monies are eventually paid does not make a scheme a monetary fraud. The authorities have long supported this view.

The leading case upon the subject is *U. S. v. Hess,* 87 Law. Ed. 443. There open bidding was required on WPA projects and certain contractors conspired to prevent competitive bidding, as a result of which 57 WPA projects were contracted for. Under these projects thousands of individual items of property and payments of money were involved. The Government contended that the $2,000.00 penalty applied to each of the thousands of items. The Court held that there was one conspiracy only in reference to each WPA project and allowed a recovery upon the basis of 57 projects.

In *U. S. v. Rohleacher,* 157 Fed. Supp. 126, there were considered 8 main contracts, under which 96 pur-

chase orders were involved. The Government contended for the $2,000.00 penalty on each of the 96 purchase orders. The Court limited the recovery to the 8 main contracts only.

In *U. S. v. Grannis,* 172 Fed. 2d 507, 10 vouchers involving fictitious claims for rental of 130 cars were involved. The Government contended that there were 140 violations, e.g., the 10 vouchers plus the 130 units, and claimed damages in the amount of $280,000.00. The recovery was limited to 10 violations, and $20,000.00 only was allowed. (Certiorari denied by Supreme Court.)

In *First National Bank of Birmingham v. U. S.,* 117 Fed. 486, the Bank sued for $12,000.00 due upon a Government contract assigned to it. In offset to this demand the Government claimed $2,000.00 per voucher on 13 vouchers, each of which were fraudulent claims since they were demands for work not performed. The Government was allowed the offset because each voucher was tainted with a separate fraudulent claim.

In *U.S. v. American Parking Car,* 125 Fed. Supp. 788, vouchers for payment were submitted containing separate false statements. Held a separate act for each separate false statement.

In *Rex Trailer Co. v. U. S.* (1956), 100 Law. Ed. 160, 5 trucks were purchased through schemes involving 5 separate veterans.

The recovery of $2,000.00 for each act was allowed upon the theory that the fraudulent use of each vet-

eran's name constituted one transaction. It is true that the cases cited deal with the application of the so-called "False Claims Act" and not the "Surplus Property Act". The question involved, however, is identical in both Acts because they both contain the identical civil penalty clause, and both Acts necessarily leave to the trier of fact the right to define the extent and character and breadth of the trick, scheme or device, dependent upon the particular circumstances of each case.

The cases cited hold it to be a question of fact for the Trial Court to determine, and this being the case the question may not be presented to an appellate court for review as a question of law alone where substantial evidence supports the theory of the trier of fact.

CONCLUSION.

It is respectfully submitted that, in the event that the appeal of these defendants be denied, the judgment be affirmed in its present form:

1. Because the Government has failed to preserve its point in the Trial Court;

2. It elected its form of remedy by filing the action;

3. It waived its right to elect at a later date by withdrawing the proposed amendment, substituting a different amendment, and proceeding to trial and judgment; and

4. In any event no prejudice to the Government resulted from the alleged ruling of the Trial Court below because:

(a) The action is barred by the Statute of Limitations;

(b) The Government would be entitled to no relief under the facts pleaded upon the prayer of the First Amended Complaint because they did not involve monies "agreed to be given"; and

(c) The scope and breadth of the trick or device has already been presented to the Trial Court and found to be adverse to the position of the Government.

Dated, Bakersfield, California,
July 15, 1958.

Respectfully submitted,
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